(1)

83-2037

Office-Supreme Court, U.S.
FILED
JUN 12 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

CITY OF LAMBERTVILLE
Appellant

v.

LAMBERTVILLE POLICEMEN'S ASSOCIATION
Respondent

ON APPEAL FROM THE NEW JERSEY SUPERIOR COURT (APPELLATE DIVISION)

JURISDICTIONAL STATEMENT

Joseph F. Shanahan
RD 2 Box 105
Lambertville, New
Jersey 08530
609-397-3158
Attorney for Appellant

Date: 11 June 1984

35 pp

QUESTION PRESENTED

Whether the decision of the Superior Court of New Jersey (Appellate Division) affirming the ruling of the New Jersey Public Employment Relations Commission is erroneous in that it contravenes Article 1, Section 10 of the United States Constitution ?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

CITY OF LAMBERTVILLE, Appellant

v.

LAMBERTVILLE POLICEMEN'S ASSOCIATION,
Respondent

ON APPEAL FROM THE NEW JERSEY
SUPERIOR COURT, APPELLATE DIVISION

JURISDICTIONAL STATEMENT

Appellant appeals from the final order of the New Jersey Superior Court, Appellate Division, dated 7 December 1983 and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

A petition for certification of the judgment of the Superior Court of New Jersey, Appellate Division was denied by the Supreme Court of New Jersey on 19 March 1984 and appears in the appendix hereto at Appendix A.

The decision of the Superior Court, Appellate Division dated 7 December 1983 appears in the appendix at Appendix B.

The decision and order of the New Jersey Public Employment Relations Commission appears in the appendix at Appendix C.

JURISDICTION

This is an appeal from an order of the New Jersey Superior Court, Appellate Division, dated 7 December 1983, granting a motion for summary disposition made by the New Jersey Public Employment Relations

Commission as a party at the next level of appeal from its own decision and order, dated 16 August 1983, and affirming the action of the Public Employment Relations Commission for the reasons stated in that agency's decision and order. Such decision is violative of Article 1, Section 10 of the United States Constitution relative to a State impairment of the obligation of contract.

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by U.S.C. Sec. 1257(2). The following decisions sustain such jurisdiction to review: Largent v. Texas, 318 U,S. 418, 63 S Ct 667, 87 L Ed 873;(1942) Lawrence v. State Tax Commission, 287 U.S. 276,282,3, 52 S Ct 556, 76 L Ed 1102;(1931) Hamilton v. University of California, 293 U.S. 245, 79 L Ed 343, 55 S Ct 197. (1934)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, Section 10 of the United States Constitution states in pertinent part:

> " No State shall..... pass any ... Law impairing the Obligation of Contracts..."

N.J.S.A. 34:13A-21 states as follows:

> " Change in conditions during pendency of proceedings; prohibition without consent
>
> During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act."

N.J.S.A. 34:13A-5.3 states in pertinent part:

" Employee organizations; right to form or join; collective negotiations

Except as hereinafter provided, public employees shall have and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity;.."

N.J.S.A. 34:13A-5.4 f states as follows:

" The commission shall have the power to apply to the Appellate Division of the Superior Court for an appropriate order enforcing any order of the commission issued under subsection c. or d. hereof, and its findings of fact, if based upon substantial evidence on the record as a whole, shall not, in such action, be set aside or modified; any order for remedial or affirmative action, if reasonably designed to effectuate the purposes of this act, shall be affirmed and enforced in such proceeding. "

New Jersey Court Rule 2:8-3 (Motion for Summary Disposition) states in pertinent part:

> " (b) Appellate Division. Within 15 days after the filing of the notice of appeal a party may, in accordance with R. 2:8-1 (a), move in the Appellate Division for a summary disposition on a showing that the issues involved on appeal do not require a full record or further argument. ... . "

STATEMENT OF THE CASE

This is an appeal from the final order of the New Jersey Superior Court, Appellate Division, granting a motion for summary disposition made by the New Jersey Public Employment Relations Commission (App C) and affirming the decision and order of that agency for the reasons stated therein. (Att B) Petition for certification was made to the Supreme Court of New Jersey which was denied on 19 March 1984.

The matter originates from an agreement made by the City Commissioners of the city of Lambertville on June 21,1983 with the Lambertville Policemen's Association for the year 1982. On 1 January 1983 a new form of government (Small Municipality Plan C with a mayor and four councilmen, N.J.S.A. 40:69A-139) took office in the city. The mayor, Mary Sheridan, appointed Joseph F. Shanahan as Public Safety Dir-

ector and representative of the city in negotiating the 1983 agreement. The city's position was that, because of the change in government which called for the terms of office of the three former commissioners to come to an end on 31 December 1982, they had no authority to bind the city or their successors in office past that date and therefore, the contract together with its stipulation that its term be extended "... until a successor agreement is signed." is invalid and of no effect. Based on such assumption the city made proposals to the association which were totally rejected.

On June 14,1983 the association filed a petition to initiate compulsory arbitration with the Public Employment Relations Commission.

On June 16,1983 the city filed a petition for scope of negotiations determination with the Public Employment Relations Commission to establish the validity or

invalidity of the 1982 agreement.

On August 16,1983 the Public Employment Relations Commission issued its decision on the matter directing the city to participate in arbitration proceedings without having referred to the contractual issue raised by the city.

The city appealed to the Appellate Division of the Superior Court on September 21,1983.

To the present date, the city is abiding by the terms of the 1982 agreement as it pertains to wages, hours,and other terms of employment.

RAISING THE FEDERAL QUESTION

Appellant raised the constitutional question of impairment of contract in its petition of certification to the Supreme Court of New Jersey.

THE QUESTIONS ARE SUBSTANTIAL

The basic substantive issue relative to the impairment of contract by the State of New Jersey is of great public moment having to do with the statewide administration of the New Jersey Employer-Employee Relations Act. If the State is permitted to continue to incorporate its statutory imperatives into the duration clauses of the collective agreements of the police and fire fighters contracts of the municipalities of the State without regard to the underlying validity of such contracts it will have a damaging effect on the public safety effort in the various communities.

ARGUMENT

POINT ONE

THE INTERPRETATION OF N.J.S.A. 34:13A-21 AS APPLIED BY THE PUBLIC EMPLOYMENT RELATIONS COMMISSION'S DECISION TO THE INSTANT CASE AND AFFIRMED BY THE APPELLATE DIVISION IS ERRONEOUS IN THAT IT CONTRAVENES ART. 1, SECT. 10 OF THE UNITED STATES CONSTITUTION

The decision of the Appellate Division states in pertinent part:

> " We affirm the action of PERC for the reasons set forth in the Decision and Order from which this appeal is taken.... "
>
> (3a)

The decision of the Public Employment Relations Commission (PERC) states in pertinent part:

> "The City and the Association are engaged in interest arbitration proceedings pursuant to N.J.S.A. 34:13A-14 et seq., but the City contends that these proceedings may not go forward until the validity of the duration clause is determined. .....
>
> Applying controlling statutes and case law, I find that the duration clause is legal.

N.J.S.A. 34:13A-21, part of the Interest Arbitration Law, provides:

> During the pendency of proceedings before the arbitrator, existing wages, hours, and other terms and conditions of employment shall not be changed by action of either party without consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.....
>
> .....
>
> Accordingly, with respect to any changes in terms and conditions of employment during negotiations or while an interest arbitration petition is pending, the guarantees of N.J.S.A. 34:13A-21 and N.J.S.A. 34:13A-5.3 are incorporated into any duration clause contained in a collective agreement. State v. State Supervisory Employees Ass'n., 78 N.J. 54 (1978). The duration clause before the Commission conforms with these statutory imperatives and is thus legal. !

(underlines added)

It is clear from the above language of the Decision that the basic issue raised by appellant, namely, the question of the validity or invalidity of the duration clause, has not been decided on the basis

of contract law but by an unsupported statement and reference to the statutory imperatives of irrelevant statutes. One of those so called controlling statutes N.J.S. A. 34:13A-21 has to do with changes in wages,hours, or other terms of employment during the pendency of proceedings before the arbitrator which obviously is not relevant since the facts are that no such changes have been made. The terms of the 1982 contract are being honored by the city. The other one, N.J.S.A. 34:13A-5.3 has to do with the right of public employees to form or join an employee organization which is not an issue nor ever has been.

Appellant's argument as made in its brief to the Commission included the following:

" In Board of Education v. Finne, 88 N.J. Super 91 (Law Div.1965) it states at 102:

Initially plaintiff says:

With respect to the power of a mun-

> icipal governing body or other public agency to bind its successors, a distinction is drawn between governmental and proprietary actions of such bodies. If a municipal body or public board is acting in the discharge of a governmental function or power they may not act so as to tie the hands of their successors.....
> There does not appear to be any dispute that the conduct of educational activities is a governmental activity as opposed to a proprietary venture..."
>
> (underline added)

Appellant argued that " In like manner there would appear to be no question that the operation of a police department is a governmental function, and therefore, the instant contract is one that is not binding on a successor government. To which no answer was given by respondent nor was it referred to in the PERC decision.

Appellant contends that the PERC Decision and Order and the affirmance of same by the Appellate Division overlook the basic issue which is, is there a valid contract to negotiate from or not. This is a most critical point. If the contract and its

duration clause are valid then the negotiations start with the 1982 contract as a base; if not, then they start from zero. This question can only be settled by the application of the principles of contract law and not by the statutory fiat of an administrative agency. In this case, the agency is stating in its Decision that"... the guarantees of N.J.S.A. 34:13A-21 and N.J.S.A. 34:13A-5.3 are incorporated into any duration clause contained in a collective agreement.", but legally, it is essential that there be a valid agreement present in order to give rise to the application of statutes, even if they were relevant to the instant situation which they are not. If there is no contract, as appellant contends then the statute or statutes are creating one where none exists.

In U.S. Trust Company of New York v. State of New Jersey, 431 U.S. 1,52L Ed 2d92, 97 S Ct 1505 it states at17:

> "It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties."

and at 22:

> " (14a) Yet private contracts are not subject to unlimited modification under the police power. The Court in Blaisdell (Home Bldg. &Loan Assn. v. Blaisdell, 290 U.S. 398, 78 LEd 413, 54 S Ct 231 (1934) recognized that laws intended to regulate existing contractual relationships must serve a legitimate public purpose. .....
> A State could not "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." Id., at 439, ..."

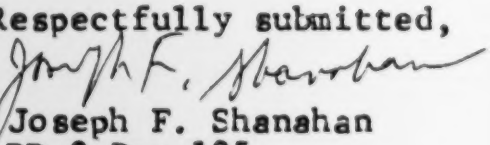
In the present instance, no evidence has been offered by respondent or the PERC that the statute or statutes were reasonable or appropriate or that they were addressed to any pertinent legitimate end. Therefore, the State is engaging in an impermissible interference with the right of contract - absent any retuttal to appellant's argument.

Such interference violates Article 1, Section 10 of the United States Constitution which states that " No State shall... pass any ... Law impairing the Obligation of Contracts."

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,



Joseph F. Shanahan
RD 2 Box 105
Lambertville, New Jersey 08530
609-397-3158
Attorney for Appellant

Date 11 June 1984

Appendices follow

APPENDIX A

SUPREME COURT OF NEW JERSEY

C-582 September Term 1983

In the Matter of 22,081

CITY OF LAMBERTVILLE,

Petitioner

and ON PETITION FOR CERTIFICATION

LAMBERTVILLE POLICEMEN'S ASSOCIATION,

AND

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondent.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-447-83T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 19th day of March, 1984.

Stephen Townsend
Clerk

APPENDIX B

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-447-83T2
MOTION NO. M-757-83
BEFORE PART C

JUDGES: FRITZ
FURMAN
DEIGHAN

CITY OF LAMBERTVILLE

vs.

LAMBERTVILLE POLICEMEN'S ASSOCIATION

REC'D APPELLATE DIVISION
DEC. 8,1983

FILED APPELLATE DIVISION
DEC. 8 1983

MOVING PAPERS FILED OCTOBER 17,1983
ANSWERING PAPERS FILED OCTOBER 31,1983
DATE SUBMITTED TO COURT NOVEMBER 30,1983
DATE ARGUED
DATE DECIDED DECEMBER 7,1983

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
CROSS MOTION FOR SUMMARY DISPOSITION	X		X

SUPPLEMENTAL:

The motion for summary disposition is granted. The standing of the Public Employment Relations Commission (PERC) to bring such a motion, challenged by appellant, is clearly implicit in N.J.S.A. 34:13A-5.4f. We affirm the action of PERC for the reasons set forth in the Decision and Order from which this appeal is taken. We direct compliance with that order. N.J.S.A. 34:13A-5.4f. The stay of our order of October 26, 1983 (M-461-83) is vacated.

For the Court

JOHN W. FRITZ P.J.A.D.

I hereby certify that
the foregoing is a true
copy of the original
on file in my office.

Elizabeth McLaughlin
Clerk
WITNESS, THE HONORABLE JOHN W. FRITZ PRESIDING JUDGE OF PART C, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 7TH DAY OF DECEMBER 1983.

Elizabeth McLaughlin
Clerk of the Appellate Division

APPENDIX C

P.E.R.C. NO. 84-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF LAMBERTVILLE,

Petitioner,

Docket No. SN-83-140

and

LAMBERTVILLE POLICEMEN'S ASSOCIATION

Respondent

Appearances:

For the Petitioner, Joseph F. Shanahan

For the Respondent, Patrolman Dennis K. Kendig

DECISION AND ORDER

On June 20,1983, the City of Lambertville (City) filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The petition seeks a determination of the validity of the duration clause in the agreement between the City and the Lambertville Police-

men's Association (Association) in view of a change in the form of City government which took effect on January 1,1983. The City and the Associationare engaged in interest arbitration proceedings pursuant to N.J.S.A. 34:13A-14 et seq., but the City contends that these proceedings may not go forward until the validity of the duration clause is determined.

The City has filed a brief and the Association has filed a letter in response. The following facts appear.

On June 21,1981, the City and the Association entered into an initial collective negotiations agreement. Article XXVII provides that " This Agreement shall be retroactive to January 1,1982 and shall continue in force and effect until December 31,1982 - or until a successor agreement is signed." Three City Commissioners signed it on behalf of the City.

On January 1,1983, a new form of government(small municipality plan C with a Mayor and Four Councimen) took office. The City's public safety director and a representative of the Association met to discuss a successor collective negotiations agreement. Prior to the exchange of contract proposals, however, the public safety director notified the Association that he considered the contract to have terminated as of January 1,1983, and that certain payments for holiday pay and personal leave would be kept in escrow pending settlement. Thereafter the Association filed an unfair practice charge against the City; this charge was withdrawn after the city Council voted to restore the payments to the police pending negotiations for a new agreement. Attempts at settlement of the contract with the aid of a PERC mediator were unsuccessful and the Association filed a Petition to Initiate Compulsory Interest Arbitration in June of 1983. There-

after the City filed the instant petition.

Pursuant to N.J.S.A. 34:13A-6(f) the full Commission has delegated authority to me to apply well-settled law to resolve scope of negotiations disputes. Applying controlling statutes and case law, I find that the duration clause is legal.

N.J.S.A. 34:13A-21, part of the Interest Arbitration Law, provides:

> " During the pendency of proceedings before the arbitrator, existing wages, hours, and other terms and conditions of employment shall not be changed by action of either party without consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

The above statute requires that existing terms and conditions of employment be maintained until negotiations for a new contract have been completed or until an interest arbitration award modifying those terms and conditions of employment has been issued. The

underlined language indicates that the rule applies even where, as here, there is a change in the employer's or employee representative's status. Moreover, the Supreme Court has required that existing working conditions be maintained during the course of negotiations for a new agreement. See Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Assn., 78 N.J. 25, 48 n. 9 (1978) and N.J.S.A. 34:13A-5.3.

Accordingly, with respect to any changes in terms and conditions of employment during negotiations or while an interest arbitration petition is pending, the guarantees of N.J.S.A. 34:13A-21 and N.J.S.A. 34:13A-5.3 are incorporated into any duration clause contained in a collective agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54(1978). The duration clause before the Commission conforms with these statutory imperatives and is thus legal.

Any further delay in continuing with interest arbitration proceedings based upon the City's contention is unwarranted and would frustrate the purpose of the interest arbitration law,in particular, and the New Jersey Employer-Employee Relations Act in general. See N.J.S.A. 34:13A-14 mandating the expeditious, effective and binding resolution of disputes in the police and fire safety services, and N.J.S.A. 34:13A-2 providing for the prompt settlement of labor disputes in the public sector. To foster this end, I will direct that the City engage in interest arbitration proceedings in accordance with the applicable statutes and regulations.[1].

ORDER

The City of Lambertville is directed to participate in interest arbitration proceedings with the Lambertville Policemen's Association in accordance with N.J.S.A. 34:13A-14 et seq. and N.J.A.C. 19:16-1.1.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED Trenton, New Jersey
August 16,1983

1. N.J.S.A. 34:13A-5.4(f) recognizes that the Commission possesses the authority to issue remedial orders in both scope of negotiations and unfair practice cases. See also Galloway Twp. Bd of Ed. v. Galloway Twp. Ed. Ass'n, supra.

APPENDIX D

IN THE SUPERIOR COURT, APPELLATE DIVISION, STATE OF NEW JERSEY

Docket No. A447-83T2
Motion No. M757-83
Before Part C

CITY OF LAMBERTVILLE

Appellant

v.

LAMBERTVILLE POLICEMEN'S ASSOCIATION

Respondent

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the City of Lambertville, New Jersey, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Superior Court of New Jersey, Appellate Division , affirming the action of the Public Employment Relations Commission entered in this action on December 8,1983. Petition for Certification was denied by the New Jersey Supreme Court on March 19,1984.

This appeal is taken pursuant to U.S.C.S. 1257 (2).

Joseph F. Shanahan
Attorney for appellant

Certificate of Service

I hereby certify that on this 25 day of May 1984 three copies each of this notice of appeal were mailed, first class mail with postage prepaid to Dennis Kendig, Representative of the Lambertville Policemen's Association 57 Elm Street Lambertville, New Jersey 08530, Irwin I. Kimmelman, Attorney General of New Jersey Richard J. Hughes Justice Complex Trenton, New Jersey and Don Horowitz, Esq. Public Employment Relations Commission 429 East State Street Trenton, New Jersey 08608 (This latter notification is not an admission that appellant recognizes PERC as a party)

S/ Joseph F. Shanahan

APPENDIX E

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of June 1984 three copies of the Jurisdictional Statement were delivered to Ptl Dennis Kendig Representative of respondent at Police Headquarters, Municipal Building Lambertville, New Jersey and also the same to the offices of Irwin I. Kimmelman, Attorney General of New Jersey Richard J. Hughes Justice Complex Trenton, New Jersey 08625 and to the offices of Don Horowitz, Esq. 429 East State Street Trenton, New Jersey 08608. (This latter service is not an admission that appellant recognizes PERC as a party)

Joseph F. Shanahan

Joseph F. Shanahan
RD 2 Box 105
Lambertville, New
Jersey 08530
609-397-3158
Attorney for appellant

Office - Supreme Court, U.S.
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CLERK

No. 83,2037

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

CITY OF LAMBERTVILLE,

Appellant,

v.

LAMBERTVILLE POLICEMEN'S ASSOCIATION,

Appellee.

ON APPEAL FROM THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

BRIEF FOR THE PUBLIC EMPLOYMENT RELATIONS COMMISSION OF NEW JERSEY

Don Horowitz
Deputy General Counsel

Arnold H. Zudick
Staff Attorney

Public Employment Relations Commission
429 East State Street
Trenton, New Jersey 08608
(609) 292-9830

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 83,2037

CITY OF LAMBERTVILLE, Appellant

v.

LAMBERTVILLE POLICEMEN'S ASSOCIATION,

Appellee.

ON APPEAL FROM THE NEW JERSEY

SUPERIOR COURT, APPELLATE DIVISION

MOTION TO DISMISS OR AFFIRM

BRIEF FOR THE PUBLIC EMPLOYMENT RELATIONS COMMISSION OF NEW JERSEY

TO the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the Public Employment Relations Commission, an administrative agency of the State of New Jersey, and respectfully moves before this Court, pursuant to Rule 16 of the Rules of this Court, for an order dismissing the appeal filed by the City of Lambertville in the above-captioned matter upon the following grounds:

1. The federal question sought to be reviewed was not timely or properly raised and was not expressly or impliedly passed upon by the decisions below;

2. The judgment below was not rendered by the highest court of the State of New Jersey in which review could be had;

3. The appeal does not present a substantial federal question.

In the alternative, the Public Employment Relations Commission moves for an order affirming the order of the

Superior Court of New Jersey, Appellate Division granting summary disposition and enforcing the order issued by the Public Employment Relations Commission.

Due to special circumstances, the Public Employment Relations Commission is represented in all judicial proceedings by its Office of General Counsel, rather than the Attorney General of New Jersey. Included in the Appendix to this motion is a copy of the appointment of Don Horowitz, Esq., Deputy General Counsel to the Public Employment Relations Commission, as Special Counsel, pursuant to N.J.S.A. 52:17A-13, made by the Attorney General of the State of New Jersey and approved by the Governor of New Jersey.

In support of this motion, the Public Employment Relations Commission shall rely upon the legal argument set forth herein.

OPINIONS BELOW

The written decision of the New Jersey Public Employment Relations Commission appears at Appendix "C" of Appellant's Jurisdictional Statement.

The form order of the Superior Court of New Jersey, Appellate Division, summarily affirming and enforcing the decision and order of the Commission, appears as Appellant's Appendix "B".

The order of the Supreme Court of New Jersey denying Appellant's Petition for Certification to review the order of the Appellate Division appears as Appellant's Appendix "A".

STATEMENT OF THE CASE

On June 21, 1982, the City of Lambertville and the Lambertville Policemen's Association entered into a collective negotiations relationship pursuant to the New Jersey Employer-Employee Relations Act

(N.J.S.A. 34:13A-1, et seq.), when the City recognized the Association as the exclusive majority representative for all its full-time police patrol officers and sergeants. On that same date, the City and the Association entered into a collectively negotiated agreement covering the police officers' terms and conditions of employment. The clause setting forth the duration of the agreement stated:

> This agreement shall be retroactive to January 1, 1982 and shall continue in force and effect until December 31, 1982 or until a successor agreement is signed.

A new form of government (Small Municipality Plan C) took effect in Lambertville on January 1, 1983. Thereafter, the City and the Association negotiated in an effort to reach a new agreement.[1/] The Commission appointed a mediator to assist the parties, but negotiations reached an impasse and a petition to

initiate compulsory interest arbitration, pursuant to N.J.S.A. 34:13A-14, et seq., was filed with the Commission on June 14, 1983.[2/]

On June 20, 1983, the City filed a Petition for Scope of Negotiations Determination asking the Commission to pass upon the validity of the duration clause in view of the change in the form of City government. Prior to issuing its formal decision, the Commission cited both parties to N.J.S.A. 34:13A-21 (quoted in Appellant's Jurisdictional Statement at p. 4), and noted that the statute was probably dispositive of the question raised by the petition.

The City nonetheless requested a formal determination. It filed a brief with the Commission setting forth two arguments: (1) the duration clause could not extend beyond the expiration date of December 31, 1982 and thus did

not bind the successor government which took office on January 1, 1983; and (2) extrinsic evidence was necessary to ascertain the true intent of the parties in agreeing upon the duration clause. No argument was made that N.J.S.A. 34:13A-21 violated U.S. Const. Art. I, Sec. 10.

On August 16, 1983, the Commission issued its decision. It held that the duration clause was valid since it mirrored the requirement of N.J.S.A. 34:13A-21 that existing terms and conditions of employment remain in effect until interest arbitration proceedings to produce a new agreement have been completed. The Commission also ordered the City to engage in interest arbitration proceedings.

The City appealed to the New Jersey Superior Court, Appellate Division and moved for a stay of the Commission's

decision. The Commission cross-moved, pursuant to R. 2:8-3(b) of the New Jersey Court Rules,[3/] for summary disposition of the appeal and also applied for enforcement of its order pursuant to N.J.S.A. 34:13A-5.4(f).[4/]

The City filed separate briefs in opposition to both of the Commission's applications. Neither brief questioned the validity of N.J.S.A. 34:13A-21 or cited U.S. Const. Art. I, Sec. 10. The Attorney General of New Jersey was served with a copy of the Notice of Appeal to the Appellate Division and the various motions. The Attorney General declined to participate in the case because "PERC's General Counsel is representing the Agency and...there is no challenge to the constitutionality of any statute or regulation of the State." (Letter of October 18, 1983, PERCmal,[5/] emphasis supplied).

On December 7, 1983, the Appellate Division, per the Hon. John W. Fritz, Presiding Judge, granted both the Commission's applications for summary affirmance and enforcement of its order. (Appellant's Appendix "B")

The City filed a Petition for Certification with the New Jersey Supreme Court, pursuant to R. 2:12-3 of the New Jersey Court Rules. This rule permits discretionary review of final judgments. In its petition, the City, for the first time, cited U.S. Const. Art. I, Sec. 10. It did not, however, attempt to proceed under R. 2:2-1(a)(1) which permits an appeal as of right "in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State...." On March 19, 1984, the New Jersey Supreme Court, per The Honorable Robert W. Wilentz, Chief Justice,

denied the City's petition with costs.

(Appellant's Appendix "A")

ARGUMENT

POINT I: THE COURT SHOULD DISMISS THIS APPEAL SINCE THE APPELLANT DID NOT PRESENT ITS CONSTITUTIONAL CLAIM TO THE PUBLIC EMPLOYMENT RELATIONS COMMISSION OR THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY AND NEITHER TRIBUNAL CONSIDERED SUCH A CLAIM.

This Court is empowered to grant a motion to dismiss an appeal pursuant to this Court's Rule 16.1(b) if it appears that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed upon below. The Court should dismiss this appeal pursuant to that rule.

In Street v. New York, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969), this Court held that if a state's highest court has failed to pass upon a federal question, it will be presumed that the issue was not properly presented to the state courts unless the aggrieved party can demonstrate to the contrary. This Court will not undertake

to review what the court below has not decided, Walters v. City of St. Louis, 347 U.S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954).

In the instant case, the City was informed at the outset of the litigation that N.J.S.A. 34:13A-21 might be dispositive of the duration clause's validity. Nevertheless, the City failed to challenge that statute's constitutional validity in the proceedings before the Commission or the Superior Court. The Commission and the Superior Court properly proceeded on the assumption -- confirmed by New Jersey's Attorney General -- that there was no constitutional issue in the case. As the City concedes in its Jurisdictional Statement (p. 10), the constitutional question was not raised until its petition for certification to the Supreme Court

of New Jersey. As a result of the City's failure to raise its constitutional issue in a proper and timely manner, none of the decisions and orders below discussed its constitutional claim and indeed none of the decisions and orders cited Art. I, Sec. 10 of the United States Constitution.

The raising of the constitutional issue for the first time before the Supreme Court of New Jersey came too late to preserve the question for review by this Court. The Supreme Court of New Jersey is not bound to consider constitutional issues not raised in inferior courts. See, Deerfield Estates Inc. v. Township of East Brunswick, 60 N.J. 115 (1972) and Domestic Fuel.Co. v. American Petroleum Corp., 6 N.J. 538 (1951). The New Jersey Supreme Court's refusal to review the constitutional issue is consistent with this Court's holdings

that a claimed denial of a federal right is not reviewable in the U.S. Supreme Court where the State court's basis for refusing to consider the claim is that the issue was not properly raised at trial or on appeal as required by state practice. Louisville and Nashville R.R. Co. v. Woodford, 234 U.S. 46, 34 S. Ct. 739, 58 L. Ed. 1202 (1914). See also, Pennsylvania R.R. Co. v. Illinois Brick Co., 297 U.S. 447, 56 S. Ct. 556, 80 L. Ed. 796, reh. den. 297 U.S. 728, 56 S. Ct. 666, 80 L. Ed. 1011 (1936).

Not only has the constitutional claim raised by Appellant not been passed upon below, but there is also a lack of any reference to the claim in the record. A claim raised in a writ of error (or in this case, petition for certification) to an appellate court is

not part of the record of the case, Warfield v. Chaffee, 91 U.S. 690, 1 Otto 690, 13 L. Ed. 383 (1875). Thus, the City has violated both the requirement that the issue raised to the U.S. Supreme Court be passed upon below and the requirement that it be contained in the record below. Accordingly, there is no jurisdiction over the appeal.

The Appellant's failure to raise the issue in a timely and proper manner, the absence of a decision below on the merits of the constitutional question, and the barrenness of the record with respect to the issue require dismissal of the instant appeal. East Tennessee V. & G Railway Co. v. Frazier, 139 U.S. 288, 11 S. Ct. 517, 35 L. Ed. 196 (1891).

POINT II: THE APPEAL SHOULD BE DISMISSED AS IT IS NOT TAKEN FROM A JUDGMENT OF THE HIGHEST STATE COURT IN WHICH A DECISION COULD BE HAD AS REQUIRED BY 28 U.S.C.A. §1257.

Appellant claims jurisdiction in this Court pursuant to 28 U.S.C.A. §1257(2). That section allows appeals from the "highest state court in which a decision could be had" if the validity of a statute has been sustained against a claim of its repugnancy to the United States Constitution.

The phrase "the highest state court" will not be construed to mean a state's supreme judicial body if review by such a court is unavailable in accordance with state practice. In Largent v. Texas, 318 U.S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (1942), a case Appellant cites, the judgment of a county court was deemed sufficient to satisfy the "highest state court" requirement since Texas

rules prohibited a further appeal based upon the size of the fine levied therein.

In the instant case, however, the Superior Court of New Jersey, Appellate Division was not the highest state court in which a judgment could have been had since New Jersey Rules would have permitted a further appeal as of right to the Supreme Court of New Jersey.[6/] N.J. Court Rules, R. 2:2-1(a)(1) permits an appeal as of right to the New Jersey Supreme Court from final judgments in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or of the State of New Jersey.

Appellant sought review by the New Jersey Supreme Court by way of certification instead of appeal. However, based upon its assertion that the

constitutionality of a state statute was implicated by the decision of the Superior Court, Appellate Division, Appellant could have attempted to proceed by the latter method of review. Even if one assumes that the City could have raised a substantial constitutional question, its failure to attempt to raise that question under R. 2:2-1(a)(1) deprived the Supreme Court of New Jersey of an opportunity to address the question which is now presented for review by this Court. Accordingly, the requirement that a judgment be obtained in a highest court of the state in which review could be had has not been met and jurisdiction under 28 U.S.C.A §1257 is not present.

POINT III: THE CITY LACKS STANDING TO RAISE ITS PATENTLY MERITLESS CONSTITUTIONAL CLAIM SINCE A STATE CANNOT BE HELD TO HAVE VIOLATED THE CONTRACT CLAUSE IN ITS RELATIONSHIP WITH ONE OF ITS POLITICAL SUBDIVISIONS.

N.J.S.A. 34:13A-21 requires public employers to maintain the status quo concerning the terms and conditions of employment of its police and fire employees while interest arbitration proceedings are conducted. The City has argued that the application of this statute, which requires it to adhere to the terms of an expired contract, represents state action impairing the obligtations of a contract between the City and the Association.

There is no substance to this claim as this Court has held that a City, as a political subdivision of the State, has no inherent right of self-government beyond the State's legislative control. For example, in City of Trenton v. State of New Jersey, 262 U.S. 182, 43

S. Ct. 534, 67 L. Ed. 937 (1923), this Court declared:

> The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned.
> 262 U.S. at 188 (emphasis supplied).

It is therefore apparent that a State possesses absolute legislative control over the powers and rights of one of its political subdivisions and may act to expand or diminish such rights without infringing Art. I, Sec. 10 of the United States Constitution.

As the State has complete power to control its political subdivisions, the City has no standing to assert its constitutional claim that the State violated its contractual rights by enacting a statute. Only those who have been injured as a result of a denial of constitutional rights can invoke the

jurisdiction of this Court. Voeller v. Neilston Warehouse Co., 311 U.S. 531, 61 S. Ct. 376, 85 L. Ed. 322 (1941).

Finally, even if the City had standing to raise its constitutional claim, it is patently frivolous to assert that a party's contractual rights are violated by requiring all parties to continue to observe the terms of their contract until they agree to change them.

CONCLUSION

The federal question raised in the City's Jurisdictional Statement was not properly or timely presented below and was not passed upon by the highest state court in which a decision could be had. Further, the City lacks standing to raise it and the claim, in any event, is frivolous. There is, therefore, no jurisdiction pursuant to 28 U.S.C.A. §1257, and the Public Employment Relations Commission respectfully requests that its motion to dismiss be granted. In the alternative, it is respectfully requested that this Court enter an order summarily affirming the decision of the Superior Court of New Jersey, Appellate Division, which affirmed and enforced the decision and order of the

Public Employment Relations Commission.

Respectfully submitted,

ROBERT E. ANDERSON, JR.,
GENERAL COUNSEL
PUBLIC EMPLOYMENT RELATIONS
COMMISSION

By: Don Horowitz
DON HOROWITZ
Deputy General Counsel

Arnold Zudick
ARNOLD H. ZUDICK
Hearing Examiner

(footnotes follow)

1/ Prior to commencing negotiations, the City unilaterally removed a benefit which had been negotiated in the prior agreement. After the Association filed an unfair practice charge with the Commission, the City restored the benefit and the charge was withdrawn prior to any decision by the Commission.

2/ The proceedings set forth in this Act empower the Commission to resolve contract disputes between police and fire employees and their public employers through compulsory interest arbitration procedures described in the Act and in administrative rules adopted by the Commission, N.J.A.C. 19:16-1-1.1, et seq. The provisions of the Act are mandatory in all municipalities which have not reached agreements with their public safety employees within a stated period prior to municipal budget submissions.

3/ This rule provides:

> Any party to an appeal may move the Appellate Division for summary disposition in accordance with R. 2:8-1(a). Such motion shall demonstrate that the issues on appeal do not require further briefs or full record. The motion may be filed at any time after filing of the notice of appeal but unless leave is otherwise granted not later than 25 days after the filing of respondents' briefs. The court may deny the motion; may grant it by affirming, reversing or modifying the judgment or order appealed from on the record before it or on such further record as it may direct; or may take such other action in respect of limitation of the issues or otherwise as it

deems appropriate. The court may summarily dispose of any appeal on its own motion at any time, and on prior notice to the parties. A motion for summary disposition shall toll the time prescribed by these rules for further perfection of the appeal.

4/ This section provides:

> The Commission shall have the power to apply to the Appellate Division of the Superior Court for an appropriate order enforcing any order of the commission issued under subsection c. or d. hereof, and its findings of fact, if based upon substantial evidence on the record as a whole, shall not, in such action, be set aside or modified; any order for remedial or affirmative action, if reasonably designed to effectuate the purposes of this act, shall be affirmed and enforced in such proceeding.

5/ "PERCma_" refers to the Appendix attached to this brief.

6/ This argument assumes that the City's constitutional claim is substantial enough to entitle the City to an appeal as of right to both the New Jersey Supreme Court and this Court. For the reasons set forth in POINT III of this brief, the Commission believes that the alleged constitutional issue is frivilous and that the New Jersey Supreme Court would have dismissed any attempt to file an appeal as of right. The City is not, however, entitled to press the instant appeal as of right unless it can convince this Court that the case presents a substantial constitutional question and if it can

do that then the City had an obligation, which it failed, to present that claim to the New Jersey Supreme Court first.

lma

APPENDIX A

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
Richard J. Hughes Justice Complex
C.N. 112
Trenton 08625
(609) 292-6058

October 18, 1983

Mrs. Elizabeth McLaughlin, Clerk
Superior Court, Appellate Division
CN 006
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: City of Lambertville v.
Lambertville Policemen's
Assoc. - Dkt. No. A-447-83T2
Motion No. M-

Dear Mr. McLaughlin:

This is to advise you and the parties that the Attorney General does not intend to file a brief in this matter or to otherwise actively participate in the appeal, including the disposition of the motion and cross-motion in this case, since P.E.R.C.'s General Counsel is representing the agency and since there is no challenge to the constitutionality of any statute or regulation of the State.

Very truly yours,

IRWIN I. KIMMELMAN
Attorney General of New Jersey

By: s/ Michael L. Diller
Michael L. Diller
Deputy Attorney General

MLD:caz
cc: Don Horowitz, Esq.
Joseph F. Shanahan, Esq.

APPENDIX B

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

July 16, 1984

Don Horowitz, Esq.
Arnold H. Zudick, Esq.
Public Employment Relations Commission
429 East State Street
Trenton, New Jersey 08608

RE: City of Lambertville v. Lambertville
Policemen's Association
No. 83-2037

Gentlemen:

Your request received July 16, 1984 for an extension of time within which to file a response to the jurisdictional statement in the above-entitled case has been granted and your time has been extended to and including August 10, 1984.

No request for a further extension of time will be entertained by the Clerk.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By: s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

qtb
cc: Joseph F. Shanahan, Esq.
Hon. Irwin I. Kimmelman

APPENDIX C

STATE OF NEW JERSEY

Department of Law and Public Safety

State House Annex

Trenton, N.J. 08625

609 292-4919

Re: Special Counsel - Public Employment Relations Commission

Pursuant to N.J.S.A. 52:17-13, Don Horowitz, Esq., who is a member of the Bar of the State of New Jersey, is hereby appointed as Special Counsel to render legal advice to the Public Employment Relations Commission and to represent them in all proceedings or actions pending before the courts.

Since Don Horowitz, Esq., is a full time employee of the Public Employment Relations Commission with the title of Deputy General Counsel to the Commission, there will be no additional compensation for legal services

in connection with this Special Counsel appointment.

s/ William F. Hyland

WILLIAM F. HYLAND
ATTORNEY GENERAL

The foregoing appointment as Special Counsel is hereby approved.

s/ Brendan T. Byrne

BRENDAN T. BYRNE
GOVERNOR

DATED: December 30, 1976

Office-Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2037

CITY OF LAMBERTVILLE
Appellant

v.

LAMBERTVILLE POLICEMEN'S ASSOCIATION
Appellant

ON APPEAL FROM THE NEW JERSEY SUPERIOR COURT (APPELLATE DIVISION)

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Joseph F. Shanahan
RD 2 Box 105
Lambertville, New Jersey
08530
609-397-3158
Attorney for Appellant
Date 18 August 1984

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Appellee

ON APPEAL FROM THE NEW JERSEY SUPERIOR COURT (APPELLATE DIVISION)

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

Appellant affirms the above as set forth in the Jurisdictional Statement and incorporates it as part of this.

ARGUMENT

I THE PUBLIC EMPLOYMENT RELATIONS COMMISSION OF NEW JERSEY HAS NO STANDING TO MAINTAIN A MOTION TO DISMISS OR AFFIRM IN THIS CASE

On the question of standing it states in Flast v. Cohen, 392 U.S. 83, 20 L Ed 2d 947, 88 S Ct 1942 (1968) at 99:

> " The "gist of the question of standing" is whether the party seeking relief has " alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." .....
> In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."

and at note #20, 20 L Ed 961 it states:

" Thus, a general standing limitation imposed by federal courts is that a litigant will ordinarily not be permitted to assert the rights of absent third parties. See, e.g. Heald v.District of Columbia, 259 U.S.114, 123, 66 L Ed 852, 854, 42 S Ct 484 (1922)..... "

(underlines added)

Appellant respectfully submits that the Public Employment Relations Commission, hereinafter the Commission, has no standing to maintain such a motion. It is not listed in the caption of the case as a party nor has it moved to intervene. It has submitted its motion to dismiss or affirm as a stranger without explaining how it could possibly have a personal stake in the outcome of the controversy or be aggrieved by reason of the decision, particularly, since it is the one which made it. It is elemental to our

judicial system that one cannot be the judge and also a party in the same case. It is possible that an administrative agency might have a legitimate interest in behalf of the public, as it sees it, in maintaining its decision before a higher tribunal because of its quasi-judicial nature. (75 Harv. L Rev.296, 1961) However, in the instant case it is not defending its own order against a reversal. The higher courts affirmed its ruling. Nor can one move in a case before becoming a party. In In re Old Colony Coal Co., 49 N.J. Super.117, 129 (App. Div. 1958) the court suppressed the brief of an individual who sought to enter the appeal "...without even the suggestion of a motion for leave to intervene. This he may not do."

The Commission seems to rely on its

being in the case because of a successful cross motion in the Appellate Division of the Superior Court, based on a combination New Jersey Court Rule 2:8-3(b)and N.J.S.A. 34:13A-5.4(f) (PERC brief 8) But a close examination of the rule and statute (PERC brief 24,25) discloses that such reliance is misplaced, and its entrance into the case. erroneous. The rule calls for a "party" to make such motion and the Commission obviously cannot qualify because it just made the ruling under appeal, which has not been ruled upon. The statute permits it to enter before the Appellate Division but only for the purpose of enforcing its order, not to litigate as a party. The wording of the rule and the statute is clear on these points. And under the circumstances, appellant will not take issue

with the procedural objections raised by the Commission but will rely on the prior Statement.

CONCLUSION

It is respectfully requested, for the above reasons, that the Court deny the Motion to Dismiss or Affirm and note probable jurisdiction for the instant appeal.

Respectfully submitted

Joseph F. Shanahan, Esq.
Attorney for Appellant

Dated 18 August 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of August 1984 three copies of the appellant's brief in opposition to motion to dismiss or affirm were mailed, with postage prepaid, to Ptl. Dennis Kendig, representative of Lambertville Policemen's Association 57 Elm Street Lambertville, N.J. 08530, to Irwin I. Kimmelman, Attorney General Richard J. Hughes Justice Complex Trenton, N.J. 08625 and to Don Horowitz, Esq. PERC 429 East State Street Trenton, N.J. 08608.

Joseph F. Shanahan
RD 2 Box 105
Lambertville, N.J.
08530
609-397-3158